SUPREME COURT, U. S.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1967

No. 1039

VAN NORMAN INDUSTRIES, INC.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

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No.

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THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

Petitioner respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Claims in this case.

Opinion Below

The opinion below is reported at —— Ct. Cl. ——, 361 F.2d 992, and is made Appendix B hereto.

Jurisdiction

On November 10, 1966, the Court of Claims denied petitioner's timely-filed motions for rehearing and further consideration of the judgment of the Court entered on June 10, 1966. Jurisdiction of this Court rests on 28 U.S.C. §1255.

Question Presented

Should this Court correct the action of the Court below in refusing to follow a decision of this Court and a decision of a Circuit Court of Appeals which the Internal Revenue Service approved in Revenue Rulings published on the working day following that on which the Court below declared its conflicts?

Statutes and Regulations Involved

The Statutes and Regulations involved are Section 4061(b) of the Internal Revenue Code of 1954, as amended, Sec. 316.55 of Treas. Reg. 46 (1940 ed.), Regulations §40.4061(b)-2 (1959 ed.) and Regulations §48.4061(b)-2 (1963 ed.). Material portions are set forth in Appendix A.[1]

Statement

The excised articles, antennae for automobile radio receivers and transceivers,[2] added neither to utility nor ornamentation of automobiles: their sole function was electronic. So found the Commissioner,[3] and the parties and the Court below concurred.[4]

The Court below sustained the automobile accessory excise assessed with respect to petitioner's sales of

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[1] The 1940 Regulations, directly applicable to the period involved, 1955-1959, incorporated the substance of this Court's decision in *Universal Battery Corp.* v. *United States*, 281 U.S. 580 (1930), and were given more detailed articulation in the 1959 and 1963 editions of the Regulations (having retroactive effect under generally established principles). See Appendix A; n. 8, *infra*.

[2] While the opinion below referred only to antennae for automobile radio receivers, the case actually involved antennae for transceivers as well, *e.g.*, Petitioner's Exhibit A-2, p. 4, referring to "antennae for all police and mobile applications."

[3] Commissioner's Findings Nos. 17, 18, 21 and 22.

[4] Opinion below, pp. 4, 5 and 6 (Appendix B, 4b-8b).

such antennae in the period beginning 1955 and ending 1958.

The Court below ignored the decision of this Court in *Universal Battery,* brought up on Solicitor General Hughes' representation of importance and deciding, at his urging, that an accessory for an automobile is an

> * * * article designed to be used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for such use, whether or not essential to the operation of the vehicle.[5]

The Regulations there considered by the Court were identical in substance with those involved in this case.[6] Addressing himself to the 1919 and 1924 editions of the Regulations—which at one point in this case the Government argued to be different in controlling respects[7]—Solicitor General Hughes told this Court:

> We submit that these regulations reasonably interpret and apply the law. They were first promulgated May 1, 1919, and were continued without substantial change until the repeal of the provisions by the Revenue Act of 1926, c. 27, 44 Stat. 9. During this time the Revenue Acts of 1921 and 1924 were enacted without material change. The interpretation of the Treasury Department has thus been impliedly recognized and approved by Congress. *Heiner* v. *Colonial Trust*

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[5] *Universal Battery Co.* v. *United States,* n. 1 *supra* at 583.

[6] Brief for Defendant in Court below, p. 5, n. 4.

[7] Defendant's Response to Plaintiff's Supplementary Brief, April 11, 1966, p. 2, n. 1.

Co., 275 U.S. 232, 235; *National Lead Co.* v. *United States*, 252 U.S. 140, 146.[8]

The Court below also went into acknowledged conflict with the decision of the Circuit Court of Appeals for the Third Circuit that illuminated taxi signs for taxis were not accessories for taxis because they were accessories for the taxi business.[9]

The working day after the Court went into such conflicts there went forth three Revenue Rulings (Appendix C), one of which expressly affirmed and gave expanded application to the decision of the Court of Appeals in the taxi sign case.[10] Compare *Fribourg Nav. Co.* v. *Commissioner*, 383 U.S. 272, 275 (1966), dealing with "a Revenue Ruling first published the day before the trial of this case in the Tax Court". Another Revenue Ruling accepted the decision of the

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[8] Brief of the Solicitor General on the Merits in *Universal Battery*, pp. 11-12.

Reg. 47, Art. 16 (1919 ed.), promulgated shortly after the excise on accessories for automobiles was first enacted, provided:

> "*Definition of accessories.*—An 'accessory' for an automobile truck, automobile wagon, other automobile, or motor cycle is any article designed to be attached to or used in connection with such vehicle to add to its utility, and which is primarily adaptable for use in connection with such vehicle, whether or not essential to its operation."

Reg. 47, Art. 16 (revised August 1924), provided:

> "*Definition of accessories.*—An 'accessory' for an automobile truck, automobile wagon, or other automobile chassis or body, or motor cycle, is any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, or any article which is primarily adapted for use in connection with such vehicle or article whether or not essential to its operation or use. * * *"

[9] Opinion below, pp. 10-11 (Appendix B, 12b), referring to *Smith* v. *McDonald*, 214 F.2d 920 (3d Cir. 1954).

[10] Rev. Rul. 66-165, 1966 Int. Rev. Bull. No. 24, p. 10; App C, [illegible]

Circuit Court of Appeals for the Ninth Circuit that camper bodies for pickup trucks were not accessories for the trucks, a decision which the Court below had questioned.[11] The third Revenue Ruling was that jacks for getting the camper bodies on and off the trucks were not accessories for the trucks because they were accessories for the camper bodies.[12]

Reasons for Granting the Writ

Thousands and thousands of businesses are at risk of the excise which put this petitioner out of the business[13]—as the Court below observed, the excise "will very likely eradicate the net profits of all but the most profitable enterprises"[14] unless passed on as Congress intended.[15] On the basis of administrative

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[11] Rev. Rul. 66-163, 1966 Int. Rev. Bull. No. 24, p. 9. *King Trailer Co.* v. *United States,* 228 F. Supp. 1013 (S.D. Cal. 1964), *aff'd,* 350 F.2d 947 (9th Cir. 1965), discussed in Opinion below, p. 10 (Appendix B, 12b).

[12] Rev. Rul. 66-164, 1966 Int. Rev. Bull. No. 24, p. 9,

[13] The House Ways and Means Committee and the Senate Finance Committee stated in their Reports on H. R. 8371, Excise Tax Reduction Act of 1965, P. L. 89-44:

> Your committee concluded that the automobile parts and accessories tax is an undesirable tax because it is regressive in its impact on the incomes of purchasers and also on the grounds that an estimated 30 percent of this tax represents a business cost item. In addition, this tax presents serious compliance and administrative burdens in large part because of the large number of taxpayers. It is estimated that there are close to 8,000 manufacturers or importers of automobile parts and accessories, which is many times the number of taxpayers involved in any other manufacturers' excise tax except those on gasoline.

H. R. Rep. No. 433, 89th Cong., 1st Sess. 20 (1965); S. Rep. No. 324, 89th Cong., 1st Sess. A-25 (1965).

[14] Opinion below, p. 11 (Appendix B, 13b).

[15] See testimony of Secretary of the Treasury, Ogden Mills, Hearings on H.R. 10236 before the Senate Committee on Finance, 72d Cong., 1st Sess. 4 (1932), quoted, Plaintiff's Brief, p. 21, n. 67.

practice of about half a century,[16] the authority of this Court for about a third of a century,[17] and experience in its business of about a quarter of a century,[18] petitioner did not collect a cent of the excise and bore the entire burden thereof.[19]

Excises have a long and unloved history—reaching to and beyond our own Revolution, and under established authority of this and other Courts are not to be imposed unless clearly owing. Doubt negates excise.[20]

The "notion of function" which the Court below "sought to develop"[21] (half a century after the excise was first imposed in modern times) not only conflicted with decisions of this Court[22] and of the Circuit Court

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[16] See Reg. 47, Art. 16 (1919 ed.) n. 8, *supra*.

[17] *Universal Battery Co.* v. *United States, supra,* n. 1.

[18] Plaintiff's Trial Brief, pp. 27B *et seq.*, Findings, 24 *et seq.* (Appendix B, 27b *et seq.*).

[19] Opinion below, p. 11 (Appendix B, 13b) Finding 34(e)-(g) (Appendix B, 32b).

[20] *United States* v. *Leslie Salt Co.*, 350 U.S. 383 (1956); *Vogel* v. *Knox,* 147 F. Supp. 10 (D. Minn. 1957); *Thermo King Corp.* v. *United States,* 354 F.2d 242 (Ct. Cl. 1965). Robert Burns had the devil take the excise man. See *Oxford Dictionary of Quotations* (2d ed., 1953), at p. 105. Samuel Johnson: "A hateful tax * * * adjudged * * * by * * * wretches hired by those to whom excise is paid." Johnson, *Dictionary,* Preface (1755), reprinted in *Familiar Quotations,* Bartlett (1955), p. 336. The Boston Tea Party and the Whiskey Rebellion both saw excises in contention. Paul, *Taxation in the United States* (1954), p. 6. See further, Costelloe, *A Page of History, Alternatives to Present Federal Taxes* (Tax Institute of America, 1964), pp. 89, 93-94.

[21] Opinion below, p. 10 (Appendix B, 12b).

[22] *Universal Battery Co.* v. *United States, supra,* n. 1.

of Appeals,[23] but also got the Court below into the absurd position of relying on a Revenue Ruling[24] that automobile radio transceivers (for two-way communications between automobiles) were neither accessories for automobiles nor radios, as authority for its holding that antennae which only served such transceivers—or receivers—and were unquestionably excised as radio accessories when sold with radios, were also accessories for automobiles.[25] Nor did the Court below undertake to explain the extrastatutory amnesty from one tax proffered by the Internal Revenue Service where, under its view, two excises would fall on the sale of the same article.[26]

The notion of multiple excise classification would bring untolerable confusion to administration of a system of excises under which only one excise has ever been imposed on one article, however sold.

Nor has the matter been made insignificant—even apart from the ruin brought on this taxpayer[27]—by partial repeal of the excises (as falling too heavily on too many even as construed before the decision below).[28] The excise lingers on for the future, for truck accessories; and for the past, for tens of thousands of manufacturers who are at risk, without any protection

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[23] *Smith* v. *McDonald*, *supra*, n. 9.

[24] Rev. Rul. 64-311, 1964-2 Cum. Bull. 417, cited in Opinion below, p. 8, n. 4 (Appendix B, 9b). Compare Rev. Rul. 64-303, 1964-2 Cum. Bull. 417, holding that a transmitter mounted on a car to open a garage door is not an accessory for the automobile.

[25] Opinion below, p. 8, n. 4 (Appendix B, 9b).

[26] Rev. Rul. 59-301, 1959-2 Cum. Bull. 291.

[27] Plaintiff's Trial Brief, p. 39 *et seq.*

[28] Report on H.R. 8371, n. 13, *supra*.

of the statute of limitations as to events occurring almost half a century ago.[29]

This case is of major importance in the administration of the revenue laws.

The Internal Revenue Service necessarily has great powers in the interpretation and implementation of those laws, but it has correlative responsibilities—and so has the Department of Justice as the Service's representative, not merely as advocate for a party to litigation.

Those responsibilities were hardly fulfilled by representations of "Service policy" in ancient years based only on what the Department of Justice called "logical implication"[30] but which policy could not have existed in fact then or in later years,[31] and as to which responsible Service personnel have confessed factual ignorance.[32]

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[29] Section 4061(b), Internal Revenue Code of 1954, as amended; Section 201(b)(2) of the Excise Tax Reduction Act of 1965. See Rev. Rul. 67-26, 1967 Int. Rev. Bull. No. 4, p. 11. The automobile accessory excise was first imposed by Section 900(2) of the Revenue Act of 1918. A taxpayer which has not filed a return with respect to a particular excise has no protection of the statute of limitations. Section 6501(c)(3), Internal Revenue Code of 1954, as amended.

[30] Defendant's Brief, p. 12.

[31] Radio sets were not made a taxable article until the enactment of Revenue Act of 1941. Prior to that time, radios were not in themselves in any excise tax category and were not as such subject to excise. Only specified radio components and accessories sold on or in connection with radios, were excised as radio apparatus. Section 607, Revenue Act of 1932. Taxing automobile radios as automobile accessories at 2% (S.T. 643, XII-1 Cum. Bull. 397 (1933), referred to in the Opinion below at p. 7 (Appendix B, 8b)) spared the radio components used in their manufacture from the 5% radio apparatus excise. Section 620, Revenue Act of 1932, S.T. 643, *supra*. Compare S.T. 409, II-1 Cum. Bull. 285 (1923), holding that automobile "emblems designed to be attached to automobiles" were not accessories for automobiles.

[32] See affidavit October 11, 1966, to the effect that a high administrative official acknowledged on June 13, 1966, that the Service

(Footnote thirty-two continued on next page)

We respectfully submit that summary reversal of the decision below is in order. This Court ought not be required to spell out a second time the definition of accessories which has obtained administratively and judicially, as well as in dictionaries,[33] for about half a century.

Taxpayers ought not be at peril of their fiscal lives through administrative zeal producing a situation described as follows by the seasoned Revenue Agent who handled this case:

> * * * on a survey of automobile parts and accessories * * * it is amazing the difference of degrees you get, whether one thing is white, or whether it is off color or black.[34]

In connection with the Revenue Rulings issued the working day after the Court below was drawn into conflicts by the Department of Justice,[35] consider Commissioner Cohen's comment:

> We must not be chameleons. We must not ask

"* * * did not know what * * * administrative practice had been." Petitioner's Memorandum, October 11, 1966.

[33] Webster's *New International Dictionary* (2d ed., 1913) at 14, defining an accessory as:

> Any article or device that adds to the convenience or effectiveness of something else but is not essential, as a speedometer on an automotive vehicle.

Webster's *New International Dictionary* (3d ed., 1963) at 91 gives the definition:

> * * * an object or device that is not essential in itself but that adds to the beauty, convenience, or effectiveness of something else (spotlights, reflectors, and other auto accessories) * * *.

[34] Revenue Agent Ryan, quoted, Plaintiff's Reply Brief, p. 19.

[35] See Revenue Rulings in Appendix C.

> a Court to adopt a position inconsistent with an established Internal Revenue position.[36]

And consider the felicitous expression of Assistant Attorney General Rogovin:

> * * * Government tax lawyers * * * should, at a bare minimum, be walking in the same general direction.[37]

Conclusion

Petitioner respectfully prays that this Court grant the writ and summarily reverse the decision below or grant such other relief it finds appropriate.

Respectfully submitted,

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February 1967

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[36] Cohen, *Current Developments in the Chief Counsel's Office*, 42 Taxes 663 (1964).

[37] Rogovin, *Impact of Computers on Tax Practice*, 25 J. Taxation 112 (1966).

APPENDIX A

Section 4061(b), I.R.C. 1954, as amended:

There is hereby imposed upon parts or accessories (other than * * * automobile radio and television receiving sets) for any of the articles enumerated in subsection (a) [*e.g.*, automobile bodies] sold by the manufacturer * * * a tax equivalent to 8 percent of the price for which so sold * * *.

Section 316.55 of Regs. 46 under I.R.C. of 1939 (1940 ed.):[1]

The term "parts or accessories" for an * * * automobile chassis or body * * * includes (1) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article, (2) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, and (3) any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use.

Regulations §40.4061(b)-2 under Section 4061 of the Internal Revenue Code of 1954 (1959 ed.):

DEFINITION OF PARTS OR ACCESSORIES.—(a) *In general.*—The term "parts or accessories" includes (1) any article, the primary use of which is to improve, repair, replace, or serve as a component part of an automobile truck or bus chassis or body, or other automobile chassis or body, or taxable tractor, (2) any article designed to be attached to or used in connection with such chassis, body, or tractor to add to its utility or ornamentation, and (3) any article, the

[1] The Regulations in this form are substantially identical with the 1924 Regulations and with the Regulations involved in the *Universal Battery case*. See p. 3, n. 8 *supra*.

primary use of which is in connection with such chassis, body, or tractor, whether or not essential to its operation or use.

* * * *

(d) *Examples of articles taxable as parts or accessories.* —Examples of articles which are taxable as parts or accessories are: automobile air conditioners, baby seats for automobiles, automobile beds, automobile hammocks, automobile clutches, bottle warmers and heating pads designed to operate from an automobile cigarette lighter, automobile radio antennae, automobile license plate frames, automobile clocks, automobile mirrors and mirror brackets, purses for carrying parking meter coins or cases for carrying registration cards when designed for attachment to an automobile; safes primarily designed for use in taxable motor vehicles; electric bulbs primarily designed and adapted for use on automobiles, automobile floor mats, jacks of the mechanical or hydraulic bumper, screw, ratchet, scissors, or other type primarily designed to be carried as accessories in automobiles as distinguished from jacks designed especially for use in garages and repair shops; dollies of the type commonly known as converter dollies which are used as connectors to convert semitrailers to full trailers; tool kits recommended for use with automobiles, automobile seat covers of any construction whether they are ready-made or custom fitted, and fitted truck top covers.

Regulations §48.4061(b)-2 under Section 4061 of the Internal Revenue Code of 1954 (1963 ed.):

DEFINITION OF PARTS OR ACCESSORIES.—(a) *In general.*

* * * * *

An article shall not be deemed to be a taxable part or accessory even though it is designed to be attached to the vehicle or to be primarily used in connection therewith if the article is in effect the load being transported and the primary function of the article is to serve a purpose un-

related to the vehicle as such. For example, a construction derrick attached to a truck is not a taxable part or accessory inasmuch as the derrick is the load of the truck and its use is in connection with construction work at a construction site rather than in connection with the transportation or loading or unloading function of the truck. On the other hand, an article such as a towing cradle or loading or unloading equipment designed to be attached to or to be primarily used in connection with a truck is a taxable part or accessory inasmuch as the article contributes to the load-carrying function of the truck. * * *

* * * * * *

(d) *Examples of articles taxable as parts or accessories.* Examples of articles which are taxable as parts or accessories are: Automobile air conditioners; baby seats for automobiles; automobile beds; automobile hammocks; automobile clutches; bottle warmers and heating pads designed to operate from an automobile cigarette lighter; automobile radio antennae; automobile license plate frames; automobile clocks; automobile mirrors and mirror brackets; purses for carrying parking meter coins or cases for carrying registration cards when designed for attachment to an automobile; safes primarily designed for use in taxable motor vehicles; electric bulbs primarily designed and adapted for use on automobiles; automobile floor mats; jacks of the mechanical or hydraulic bumper, screw, ratchet, scissors, or other type primarily designed to be carried as accessories in automobiles as distinguished from jacks designed especially for use in garages and repair shops; dollies of the type commonly known as converter dollies which are used as connectors to convert semitrailers to full trailers; tool kits recommended for use with automobiles; automobile seat covers of any construction whether they are ready-made or custom fitted; fitted truck top covers; glass cut to size for installation in automobiles; and automobile bearings, such as automobile crankshaft or connecting rod bearings.

APPENDIX B

Opinion of Court of Claims

IN THE UNITED STATES COURT OF CLAIMS

No. 9–61

(Decided June 10, 1966)

VAN NORMAN INDUSTRIES, INC. v. THE UNITED STATES

John F. Costelloe, attorney of record, for plaintiff. *James W. Rayhill, Toni Rembe, Edward S. Wallach*, and *Chadbourne, Parke, Whiteside & Wolff*, of counsel.

Gilbert W. Rubloff, with whom was *Assistant Attorney General Mitchell Rogovin*, for defendant. *C. Moxley Featherston, Lyle M .Turner*, and *Philip R. Miller*, of counsel.

Before COWEN, *Chief Judge*, LARAMORE, DURFEE, DAVIS, and COLLINS, *Judges*.

OPINION

LARAMORE, *Judge*, delivered the opinion of the court:

The question in this case is whether radio antennae, designed to be attached to automobile car bodies, are taxable as "automobile parts or accessories" under the manufacturers' excise tax provisions of the Internal Revenue Code of 1954. 26 U.S.C. § 4061(b) (Supp. II, 1952 Ed.). Plaintiff[1] paid the eight percent tax for the period October 1,

[1] Plaintiff was merged into Universal American Corporation, a Delaware corporation, on January 31, 1962.

1955 to December 31, 1958, and petitions here for a refund of $138,240.82, with interest.

Plaintiff entered the radio antennae business on October 1, 1955, by acquiring the assets of the Insuline Corporation of [2] America. Until May 31, 1957, it continued the business in a wholly-owned subsidiary; thereafter, it liquidated the subsidiary into itself and carried on the business directly. Subsequently, mounting operating losses forced final liquidation on December 31, 1958. For the duration of its proprietorship, plaintiff manufactured and sold three general types of antennae: automobile radio antennae, home radio antennae, and simulated antennae. Our concern is limited to the first. Automobile radio antennae must meet certain requirements to overcome the reception difficulties created by automobile design and use. Thus, automobile antennae must be durable for outside mounting, they must be insulated from the body, and they must be sensitive to receive signals from all directions. Plaintiff designed and manufactured antennae meeting these minimum requirements. Of course, most of its products met other requirements as well; *e.g.*, many were designed for installation on specified automobile models, many had special features such as the ability to telescope or rise and lower automatically, many were made of special metals or available in unusual shapes and colors. In short, plaintiff offered a wide range of automobile radio antennae products to meet both minimum functional requirements and the vagaries of automobile owner taste. It distributed these products through wholesalers who dealt in automobile replacement parts and accessories.

In October 1955, when plaintiff entered the radio antennae business, the Internal Revenue Code of 1954 was in effect. Section 4061(b) imposed the following tax:

> There is hereby imposed upon parts or accessories (other than * * * automobile radio and television receiving sets) for any of the articles enumerated in subsection (a) [*e.g.*, automobile bodies] sold by the

> manufacturer * * * a tax equivalent to 8 percent of the price for which so sold * * *.

Because this was substantially the same as the 1939 Code provision (section 3403(c)), the regulations under the 1939 Code were made applicable. Int. Rev. Code of 1954, § 7807(a); Treas. Reg. 46, § 316.2(k) (1955). Section 316.55 of those regulations gave the following definition of automobile "parts or accessories":

[3]

> The term "parts or accessories" for an * * * automobile chassis or body * * * includes (1) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article, (2) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, and (3) any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use.

Insuline never paid the tax, nor did it indicate to plaintiff at the time of the sale of assets that plaintiff might be subject to tax in the future.[2] As part of the acquisition procedure, plaintiff requested a certified balance sheet to show the financial conditions of Insuline as of September 30, 1955. Neither the balance sheet nor an accompanying schedule of taxes payable showed any contingent excise tax liability. Not until September or October of 1957 did plaintiff realize that a tax might be asserted. It was at this time that it first heard about a 1956 Revenue ruling which held that automobile antennae were taxable as "parts or accessories" under section 4061(b). Rev. Rul. 56–698, 1956–2 Cum. Bull. 801. Because it feared an

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[2] Under the contract of sale, plaintiff assumed Insuline's liabilities; however, it assumed only those liabilities specifically enumerated in the audited financial statement of September 30, 1955.

assessment accompanied by substantial penalties and interest, plaintiff began in earnest to find the answer to the tax question. Simultaneously, it started to accrue the contingent liability. As a first step, plaintiff's "house" accounting and legal advisors discussed the problem to review the reasons for Insuline's policy which they had continued. The record does not show the results of this inquiry; we know only that after this investigation, plaintiff concluded that it needed counsel's help. Two law firms were consulted in late 1957. A tax expert at plaintiff's regular law firm went to the Internal Revenue Service and established that the Service's position was clear that the automobile antennae were taxable. The record suggests that there was some discussion about a prospective-only application for the 1956 ruling, but plaintiff's witness could not give any conclusive testimony on the point. Whatever discussions there might have been on this point, however, plain- [4] tiff followed counsel's advice to file returns for the entire period it had owned the Insuline business. Plaintiff also filed a statement that it had not previously paid the tax on the advice of its accounting firm. For this reason, the Service waived the delinquency penalties.

We have developed the facts from our commissioner's findings of fact. Under the order of reference, he did not submit an opinion or recommended conclusion of law. However, he did make certain "ultimate conclusions" which help us resolve the legal issue. He concluded the antennae "were not designed to add to the utility, as movable vehicles, * * * or ornamentation of the automobiles to which they were attached," but their "primary use * * * was in connection with automobiles." Both parties accept the report in its entirety. It may seem that plaintiff is admitting too much, because the ultimate conclusions neatly dovetail with the formulae in the regulations. Thus, although under our commissioner's view the antennae

would not qualify as items adding to utility or ornamentation under clause (2) of section 316.55, *supra,* they would seem to qualify under clause (3) which prescribes taxability for "any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use."

Plaintiff builds its argument on the premise that clause (3) does not mean what it apparently says. Plaintiff tells us we must give meaning to the words "whether or not essential to its operation or use." The theory is that primary physical use in connection with automobiles is not in itself the measure of taxability. If it were, there would have been no need for the "whether or not essential to its operation or use" language. Plaintiff says this language must mean that to be taxable, the article need not be *essential* to the automobile's operation or use, but it does have to serve *an* automotive function and this function must be *primary.* Support for this is found in the current regulations. Section 48.4061(b)–2(a) preserves the "primary use in connection with" test which it qualifies with new language stating that an article will not be taxable even though designed to be attached to the vehicle "if the article is in effect the load being transported and the primary function of the article is to serve a purpose unrelated to the vehicle [5] as such."[3] An example of such an exempt article is a construction derrick attached to a truck. As the last step in its argument, plaintiff

[3] Section 48.4061 (b)–2(e) of the current regulations provides that the "parts or accessories" section "shall be effective with respect to sales made on or after January 1, 1964." Reference is made to section 40.4061 (b)–2 for the definition applicable to sales in prior years. Section 40.4061 (b)–2 did not contain the qualifying language relied upon by plaintiff. Inasmuch as *this part* (the qualifying language) of the new regulations was well established by rulings, as the text *infra* shows, it is reasonable to assume that for this limited purpose the normal rule for interpretive regulations obtains—*i.e.*, that they have retrospective as well as prospective effect.

analogizes its automobile radio antennae to articles which are "the load being transported" and points out that the primary function of its products was "to serve a purpose unrelated to the vehicle as such"—*i.e.,* they were designed (as our commissioner found) "only to facilitate the satisfactory performance of radio receiving sets mounted within such automobiles," and had no automotive purpose or function.

Defendant brands plaintiff's theory as "revolutionary," and asserts that the "grandfather" case of *Universal Battery Co.* v. *United States,* 281 U.S. 580, 583 (1930), originally used the language now seized upon by plaintiff. Defendant argues that the regulations simply picked up this language without intending to modify the Supreme Court's "primary use in connection with" test. Regarding the analogy of an antenna to a construction derrick, defendant suggests that in the case of derricks, cranes, concrete mixers and the like, the truck is actually the accessory. Rev. Rul 59-288, 1959-2 Cum. Bull. 250. Then it states the obvious, that an automobile is in no sense accessory to a radio antenna, and rounds out the argument with the proposition that "primary function," if that means "contribut[ing] to the *operation* of the vehicle" as plaintiff apparently urges, could not be the test inasmuch as the majority of the articles specifically enumerated in the current regulations have functionally little to do with the operation of the vehicle. See Treas. Reg. § 48.4061-2(d).

We are of the opinion that we have to look to the functional relationship of the article to the vehicle and not physical connection alone; this follows from *Universal Battery.* In determining the permissible scope of the Commissioner's taxing power, the Court took some pains to analyze the theory of taxing automobile accessories and concluded as follows:

[6]

> Thus the scheme of taxation embodied in these provisions centers around the motor vehicles enumerated therein. Their sale is the principal thing that is taxed, and the sale of parts and accessories "for" such vehicles is taxed *because the parts and accessories are within the same field with the vehicles and used to the same ends.* [281 U.S., at 583.] [Emphasis added.]

Presumably an article connected to a vehicle but not "within the * * * [motor vehicle] field" and not "used to the same ends" would not be taxable. Of course, any article that is designed for attachment to motor vehicles is immediately suspect, but the inquiry does not stop there. Properly viewed, attachment or connection raises a presumption only, rebuttable by evidence showing that "the primary function of the article is to serve a purpose unrelated to the vehicle as such." Thus, as plaintiff points out, the Service has long held that such articles as wrecking cranes, construction derricks, and concrete mixers which are designed for attachment to trucks, are not taxable because their primary function relates to nontransportation activities, and they do not contribute to any transportation activity. *E.g.*, S.T. 573, XI-2 Cum. Bull. 473 (1932); Rev. Rul. 165, 1953-2 Cum. Bull. 422; Rev. Rul. 56-479, 1956-2 Cum. Bull. 796; Rev. Rul. 59-288, 1959-2 Cum. Bull. 250. However, where the primary function relates to the transportation activity, for example, where a truck-mounted crane is designed for loading and unloading thereby "contribut[ing] to the load-carrying function of the truck," the article is taxable. *E.g.*, Rev. Rul. 65-166, 1965-1 Cum. Bull. 465; Rev. Rul. 65-156, 1965-1 Cum. Bull. 464. The current regulations now incorporate the distinction. Treas. Reg. § 48.4061(b)-2(a) (1964).

Plaintiff's automobile radio antennae were designed for attachment or connection to automobiles, making the "parts

or accessories" tax presumptively applicable. To rebut the presumption, plaintiff has relied on the undisputed showing in the record that the primary function of the antennae was to facilitate radio reception. This is not enough, however; the tax will be applicable unless "the primary function of the article is to serve a purpose unrelated to the vehicle as such." There is no precise measure of how close the relationship to vehicle use must be. The generality of the term, "parts or [7] accessories" suggests a broad interpretation. Reference to the examples in the regulations and rulings makes clear that it is the Service's view that the barest relationship will suffice. We are of the view that insofar as automobile radio antennae facilitate radio reception in an automobile they serve a purpose related to the vehicle as such and are "within the * * * [motor vehicle] field" and "used to the same ends," to use the words of the Supreme Court. This is borne out by a review of the administrative practice and case law.

In 1933, the Commissioner of Internal Revenue was asked whether automobile radio sets were subject to the tax on automobile "parts or accessories" or the tax on radio components. Revenue Act of 1932, §§ 606-607, ch. 209, 47 Stat. 169, 261-263. The Commissioner advised that "[a]utomobile radio sets specially designed and primarily adapted for use in automobiles are considered automobile accessories * * *." S.T. 643, XII-1 Cum. Bull. 397 (1933). The Revenue Act of 1941, § 545, ch. 412, 55 Stat. 687, 712-713, amended section 3404 of the Internal Revenue Code of 1939 (the successor to section 607 of the 1932 Act) to impose a ten percent tax on automobile radio receiving sets. Simultaneously, section 544 (b) of the 1941 Act was enacted to amend section 3403(c) of the 1939 Code (the successor to section 606 of the 1932 Act) to expressly exclude radios from the five percent tax on automobile "parts or accessories." Congress apparently agreed with the Commissioner's earlier interpretation that "parts or accessories" included automobile radio receiving sets be-

cause it not only imposed a new tax on them in one section, but also amended the broad "parts or accessories" provision to specifically exclude them. S. Rep. No. 673, Part I, 77th Cong., 1st Sess., p. 48 (1941); H. Rep. No. 1040, 77th, Cong., 1st Sess., pp. 32, 55 (1941). This dichotomy was carried into the Internal Revenue Code of 1954.

Automobile radio antennae are certainly as much automobile "parts or accessories" as automobile radios were before 1941 unless they came under the post-1941 umbrella of "automobile radio receiving sets." There are two reasons suggesting they do not. First, the parenthetical phrase which took "automobile radio receiving sets" out of the automobile "parts or accessories" provision referred only to "sets" and not to "sets" *and* parts or accessories sold separately. [8] Int. Rev. Code of 1939, § 3403(c); Int. Rev. Code of 1954, § 4061(b). Second, the radio excise tax provision in which automobile radios were placed taxed as components "antennae of the 'built-in' type" only, and not automobile radio antennae.[4] Int. Rev. Code of 1939, § 3404(b); Int. Rev. Code of 1954, § 4141-4142. This does not, then, appear to be the kind of problem created by the repeal of a tax on an article and the possible application of another, more general, tax that we recently faced in *Thermo King Corp.* v. *United States,* 173 Ct. Cl. —, 354 F. 2d 242 (1965). What happened here is that Congress in 1941 effectively repealed so much of the auto-

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[4] In its briefs and oral argument plaintiff indicated that the defendant's argument would lead to double taxation, for the antennae would surely be considered accessories to radios as well as to automobiles. This is somewhat misleading, as the facts show that none of plaintiff's automobile antennae sales were "in connection with the sale [of radios]." (The radio excise tax imposes tax on accessories sold with radios and on specified accessories or components when sold separately. Int. Rev. Code of 1954, §§ 4141-4142). If there were a double tax possibility, however, there is nothing to indicate that the Service would attempt to impose both taxes. The practice has been to assess the tax which "more specifically applies to that article." See Rev. Rul. 59-301, 1959-2 Cum. Bull. 291 (rear seat speakers); Rev. Rul. 64-311, 1964-2 Cum. Bull. 417 (mobile transceivers designed for automobile use).

mobile excise tax as it related to automobile radio receiving sets and subjected them to a higher tax elsewhere. The other provision did not apply to the antennae when sold separately, so it may be assumed that the lower automobile excise tax continued to apply to them. Plaintiff is really asking us to read into the 1941 legislation an intention to exempt the antennae from tax altogether, a result which would be incongruous in view of the fact that Congress exempted radios from the automobile excise tax for the purpose of exposing them to a higher tax. Thus, the Service was on sound ground when it ruled in 1956 that automobile radio antennae were taxable. Rev. Rul. 56-698, *supra*. Then in 1959, it reviewed the whole "parts or accessories" area prior to promulgating the first set of regulations interpreting section 4061(b) of the 1954 Code (the 1939 Code provision, section 316.55, was applicable from 1955 through 1959), and decided to add an "examples" provision. This provision gathered together many of the articles that had been ruled upon, and the Service took the logical step of including automobile radio antennae. Treas. Reg. § 40.4061 (b)-2(d), T.D. 6401, 24 F.R. 5901, 1959-2 Cum. Bull. 258, [9] 264. As an interpretative regulation, it had retrospective as well as prospective effect. Treas. Reg. § 40.0-4. See n. 3, *supra*.

The parties have argued the case law at length, so although we feel the early administrative practice is dispositive, we think it appropriate to discuss some of the cases. In *Universal Battery Co.* v. *United States, supra,* the Supreme Court reviewed five Court of Claims cases and attempted to fashion a standard of taxability.[5] In applying that standard to the cases on review, it reversed and remanded two and affirmed three. *Bassick Mfg. Co.* v. *United States,* 68 Ct. Cl. 366 (1929), *rev'd; Universal Battery Co.* v. *United States,* 66 Ct. Cl. 748 (1928), *rev'd*; *F. W. Stewart Mfg. Corp.* v. *United States,* 67 Ct. Cl. 275

[5] See discussion regarding *Universal Battery, supra.*

(1929), *aff'd; Gemco Mfg. Co.* v. *United States,* 67 Ct. Cl. 287 (1929), *aff'd; Vesta Battery Corp.* v. *United States,* 67 Ct. Cl. 711 (1929), *aff'd.*

In *Masterbilt Products Corp.* v. *United States,* 95 Ct. Cl. 451, 42 F. Supp. 294 (1942), this court considered the applicability of the "parts or accessories" tax to an article which dispensed lighted cigarettes and was designed for attachment to automobile steering posts. There, as in *Universal Battery,* the question was whether an article adapted to automobile and non-automobile use (the cigarette dispensers could have been attached to a table or desk, for example), but primarily adapted for use in automobiles, should be taxed. The court held the cigarette dispensers were "parts or accessories" because they were "primarily adapted for use in motor vehicles" and served a purpose relating to the vehicle as such. It looked to those facts showing that they were "advertised as a safety device * * * which enabled the operator of a car to obtain a lighted cigarette without taking his eyes from the road." 95 Ct. Cl., at 454, 42 F. Supp., at 296. Two Ninth Circuit cases use a similar approach. *Masao Hirasuna* v. *McKenney,* 135 F. Supp. 897, 900 (D. Hawaii 1955), *aff'd,* 245 F. 2d 98 (9th Cir. 1957) (automobile seat covers); *Aran* v. *United States,* 259 F. 2d 757, 759 (9th Cir.), *cert. denied,* 358 U.S. 866 (1958) (baby bottle warmers designed to receive electric power from automobile cigarette lighter outlets). In *Aran,* the court ac- [10] knowledged the broad scope of the "parts or accessories" provision, stating that it "can be interpreted rationally to include devices not essential to the operation or use of an automobile." 259 F. 2d, at 759. Citing the administrative practice of taxing other articles designed to operate from automobile cigarette lighter outlets—*e.g.,* utility lights, heating pads, air-conditioners—the court emphasized the importance of the fact of a vehicle-related function, and concluded that the baby bottle warmer, designed and advertised for auto-

mobile use, met the test. We think all these cases are consistent with the notion of function we have sought to develop in the present case. See also *King Trailer Co.* v. *United States*, 228 F. Supp. 1013, 1019-1020 (S.D. Cal. 1964), *aff'd*, 350 F. 2d 947 (9th Cir. 1965).

Smith v. *McDonald*, 214 F. 2d 920 (3d Cir. 1954) unquestionably supports an argument that automobile radio antannae are analogous to automobile radios and should, therefore, be excluded from the automobile "parts or accessories" tax. However, it also supports our view of automobile function. The article in question was an electric sign designed to be attached by suction cups to taxicab roofs. In 1941, there was a ten percent tax on electric signs and a five percent tax on automobile "parts or accessories." Int. Rev. Code of 1939, §§ 3406(a)(5), 3403(c). In 1942, the former tax was repealed. Plaintiff paid the ten percent tax in 1941 and no tax after its repeal. In 1950, the Collector assessed the automobile "parts or accessories" tax on all sales made after March 1945. This was very similar to the situation in *Thermo King Corp.* v. *United States, supra.* The Third Circuit did not use a *Thermo King* approach—*i.e.*, it did not conclude that repeal of the specific tax forbade application of the general; rather, it reasoned that taxi signs should be treated like taxi meters which, like automobile radios, were excluded from the "parts or accessories" tax. Treas. Reg. 46, §§ 316.55(a), 316.140(c). The court indicated that were this exclusion not available, the signs would be within the ambit of "vehicle-related function":

> Certainly it cannot be gainsaid that radios add to the "utility" of an automobile and particularly that taxi meters add to the "utility" of an automobile used as a taxicab. [214 F. 2d, at 922.]

[11]

This is the portion of the opinion that comports with our view. Like the District Court in *Masao Hirasuna* v. *McKenney, supra,* though, we question that part of the opinion that analogizes taxi signs to taxi meters. 135 F. Supp., at 899. It seems to us that the statute exempted automobile radios and the regulations exempted taxi meters because both were specifically taxed elsewhere at higher rates. Without more, we could not find any intention to similarly exempt articles that may be analogous if they are not taxed elsewhere.

In its petition, plaintiff alleged that it never collected the tax from a customer, nor did it ever pass the tax on. Our commissioner treated this as one of the issues in the case and made uncontested findings that confirm plaintiff's allegation. Accordingly, plaintiff is the proper party in interest under section 6416 of the Internal Revenue Code of 1954. It is true, of course, that manufacturers are expected to pass an excise tax on. See *Worthington Pump & Machinery Corp.* v. *United States,* 129 Ct. Cl. 87, 122 F. Supp. 843 (1954). Unless an eight percent tax on gross sales income is passed on, it will very likely eradicate the net profits of all but the most profitable enterprises. Plaintiff urges that imposition of this tax forced it out of the automobile antennae business, and that such a result is "a vivid example of administrative malfunction." The complaint seems to be that the Service unexpectedly and erroneously reversed what plaintiff claims to be a long-standing policy of not taxing automobile radio antennae when it published the 1956 ruling "having purportedly retroactive effect." Rev. Rul. 56-698, 1956-2 Cum. Bull. 801. Although plaintiff has not expressly suggested that the Service abused its discretion under section 7805(b) of the Internal Revenue Code of 1954 in not limiting the ruling to a prospective-only application, we think that argument is implicit in the charge of "administrative mal-

function." It has no merit, though, because unlike the plaintiff in *International Business Machines Corp.* v. *United States,* 170 Ct. Cl. 357, 343 F. 2d 914 (1965), *cert. denied,* 382 U.S. 1028 (1966), plaintiff cannot even get over the first hurdle by showing that either it or its predecessor ever requested a ruling, nor has it shown any discrimination. Instead, the facts suggest that plaintiff simply relied on Insuline's prior [12] policy and after becoming aware of the ruling determined that the tax was applicable. Even after it paid the deficiencies and started to pay current installments, however, it did not change its price policy to pass the tax on, apparently because of the extremely competitive conditions in the industry. This is not a picture of administrative abuse. Plaintiff's damage is not the fault of the tax law; rather, it stems from the combined effect of unfortunate advice and a highly competitive market for which we cannot grant relief.

Judgment is entered for the defendant. Plaintiff's petition is dismissed.

Findings of Fact

The Court, having considered the evidence, the report of Trial Commissioner Robert K. McConnaughey, and the briefs and argument of counsel, makes findings of fact as follows:

The Questions

1. (a) Whether an excise tax imposed by section 4061(b) of the Internal Revenue Code of 1954 on sales of parts or accessories for automobiles (other than tires and innertubes, and other than automobile radio and television receiving sets) was properly applied to sales, by the plaintiff and by its wholly owned subsidiary, Insuline

Corporation of America, of devices adapted to be mounted on automobiles and to function as antennae for automobile radio receiving sets, and

(b) Whether the plaintiff bore the burden of the excise taxes paid on sales of automobile radio antennae between October 1, 1955, and December 31, 1958, or passed such taxes on to purchasers.

The Plaintiff

2. (a) At all times material to this action, the plaintiff was a Massachusetts corporation. Its principal place of business was New York City.

(b) Effective January 31, 1962, the plaintiff was merged into a Delaware corporation, named Universal American Corporation. It, too, had its principal place of business in New York City.

[13]

3. On October 1, 1955, Insuline Corporation of America, a Delaware corporation, which was engaged in making automobile radio antennae in Manchester, New Hampshire, became a wholly owned subsidiary of the plaintiff.[1] It remained so until May 31, 1957, when it was liquidated, and the plaintiff, as its sole stockholder, acquired all of its assets, assumed its liabilities, including its tax liabilities, and surrendered its stock for cancellation.

4. The plaintiff owns the claims asserted in this action. They have not been assigned or transferred except in

[1] In October 1955, the plaintiff acquired all the assets and certain liabilities of a preexisting corporation, called Insuline Corporation of America. It then formed a new corporation, similarly named, which carried on the automobile radio antenna business, as a wholly owned subsidiary of the plaintiff, until May 31, 1957. Thereafter the plaintiff itself continued the radio antenna business for about a year and a half.

connection with the merger described in finding 2(b), and the liquidation of Insuline described in finding 3.

The Nature of the Plaintiff's Business

5. (a) Between October 1, 1955, when Insuline was acquired by the plaintiff, and May 31, 1957, when it was liquidated, Insuline was engaged in the manufacture and sale of automobile radio antennae.

(b) From the date of Insuline's liquidation, May 31, 1957, the plaintiff continued the manufacture and sale of automobile radio antennae until about December 31, 1958.

6. The plaintiff (and, before the plaintiff, Insuline) sold its automobile radio antennae primarily to wholesale dealers, jobbers, and distributors, many of whom dealt in replacement parts and accessories for automobiles, and few of whom dealt exclusively in radios and radio accessories.

Regulations and Rulings

7. Treasury regulations applicable between October 1, 1955, and December 31, 1958, defined automobile parts and accessories as including—

> (a) any article the primary use of which is to improve, repair, replace, or serve as a component part of such vehicle or article, (b) any article designed to be attached to or used in connection with such vehicle or article to add to its utility or ornamentation, and (c) [14] any article the primary use of which is in connection with such vehicle or article whether or not essential to its operation or use.[2]

8. Late in 1956, somewhat more than a year after the plaintiff first entered the business of making and selling

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[2] Treas. Reg. 46, § 316.55 (1940).

automobile radio antennae, through its wholly owned subsidiary, Insuline, the Internal Revenue Service issued the following ruling:[3]

> An automobile radio antenna, even though not essential to the operation or use of an automobile, is an article the primary use of which is in connection with an automobile. Therefore, sales by the manufacturer of automobile radio antennae are taxable as sales of "parts or accessories" under section 4061(b) of the Internal Revenue Code of 1954.

The Nature and Use of Plaintiff's Radio Antennae

Three types

9. The antennae manufactured and sold by the plaintiff consisted of three general categories—functional automobile radio antennae, functional home radio antennae (for apartments, houses, and hotels), and simulated antennae.

Functions of plaintiff's automobile radio antennae

10. The primary function of the plaintiff's automobile radio antennae was to receive radio signals radiated by a transmitter and to convey them, through connecting cables, to radio receiving sets inside the automobiles to which they were attached, for reproduction by the receiving sets as audible and intelligible sound, in such ratio to audibly reproduce, extraneous, electronic noise (sometimes called static) as to enable users of the radio sets in the automobiles to understand and enjoy the transmitted radio program.

Form and structure of functional antennae

11. (a) A basic element of each of the numerous models of automobile radio antennae manufactured and sold by

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[3] Rev. Rul. 56—698, 1956—2 Cum. Bull. 801.

the plaintiff was a metal mast, adapted for attachment to an automobile by means of insulated washers and nuts, or other [15] fastening devices, which usually were sold as part of the antenna.

(b) In its catalogues, the plaintiff represented some models of its antennae as adapted to attachment to automobiles at various, specifically designated places on the automobile, such as the cowl, fenders, roof, or rear deck. Some models were described as suitable for mounting on any car, old or new. Others were represented as suitable for mounting on certain makes and models of automobiles, specifically designated.

(c) Nothing in the catalogues specifically indicates whether the masts of the plaintiff's automobile radio antennae could, without modification, be mounted elsewhere than on automobiles, or at places on automobiles other than those identified in the catalogues, or whether, if they were mounted elsewhere, they would function as radio antennae. Some of the catalogues did, however, list and illustrate mast antennae (or antennas) for apartments, homes, and hotels, which appear to be generally similar, except for their mounting brackets, to the automobile radio antennae illustrated in the same catalogues.

12. According to uncontradicted evidence additional to the plaintiff's catalogues, the masts of the plaintiff's automobile radio antennae were similar to metal masts sometimes used as antennae for home radios. The evidence as a whole does not specifically show, however, whether the plaintiff's automobile radio antennae, in the form in which they were sold, were suitable for use as antennae for home radios.

13. (a) Desirable qualities in masts of radio antennae generally are that they be metal, that they be vertical, that they be as large in diameter as possible, that they

have good contact with the wire leading to the radio, that they be rigid, and that they be as "long" (electronically, in terms of radio wave lengths, as distinguished, to some extent, from physical length) as possible.

(b) In addition to the qualities applicable to radio antennae generally, the masts of automobile radio antennae require special qualities in order to function effectively in an automotive environment. Although the diameter and length of the masts of automobile radio antennae are limited by the physical conditions in which such antennae are used, the [16] masts of effective antennae for home radios nevertheless may be smaller than those needed in automobiles. Automobile radio antennae preferably should be stronger than home radio antennae, in order to withstand the greater physical rigors imposed by their location on the outside of an automobile. They need to be more sensitive and efficient than home radio antennae, in order to handle the radio signals received by auto radios, which frequently are weaker than those usually received by home radios. Moreover, an automobile radio antennae must be omnidirectional, inasmuch as it cannot be moved, in order to orient it to incoming radio impulses, as a home radio antenna can.

(c) Nothing in the evidence indicates that these superior qualities, requisite in the masts of automobile radio antennae, incapacitate them for use as radio antennae elsewhere than on automobiles, although there is no evidence that the plaintiff ever sold its automobile radio antennae for any use except on automobiles, or that they were designed for any other use.

14. In addition to the features described in finding 13(b) that are desirable, if not necessary, in the masts of automobile radio antennae but not requisite in antennae for home radios, the principal differences between automobile radio antennae and home radio antennae derive

from the need for outside mounting, in order to enable the radio to receive an adequate signal, and for special types of cables to connect the antenna mast to the radio set, in order to eliminate or minimize the intrusion, into the sounds reproduced by the radio receiver, of extraneous, electronic noise generated by various mechanisms of the automobile itself.

15. (a) During the period between October 1, 1955, and the end of 1958 (in contrast to the practice in an earlier period when automobile radio antennae frequently were mounted under a running board, or inside the soft top that characterized earlier automobiles), the mast portion of the plaintiff's antennae was specifically adapted to mounting outside the body of an automobile.

(b) One reason for this was that, during the period in question here, the structure of automobiles no longer included running boards or a soft top.

[17]

(c) In addition, the all-steel bodies of then-contemporary automobiles electronically shielded the interior of the automobile, so that the effectiveness of antennae mounted inside the body would be impaired, if not wholly frustrated. Consequently, exterior mounting of the antenna mast was desirable, if not essential to its effectiveness as a means of receiving radio signals and transmitting them, by means of connecting cables, to a radio receiving set located inside the shield afforded by the all-steel body.

(d) The plaintiff's automobile radio antennae were specifically designed for mounting on the outside of automobiles in order to meet the conditions and requirements mentioned in findings 14, 15(a), 15(b) and 15(c).

16. (a) Most of the plaintiff's automobile radio antennae included, already attached, cables for connecting

the antennae to a receiving set in the automobile, although some were sold without cables, and cables were also sold separately.

(b) Although the mast portion of the plaintiff's functional automobile radio antennae did not differ substantially from similar parts sometimes used as antennae for home radios, the cables for connecting the antennae to the receiving set within the automobile differed from the wires commonly used to connect antennae with home radios. In contrast to simpler wires that were adequate to connect radio antennae to home radios or television sets, cables for the plaintiff's automobile radio antennae were especially designed to afford shielding against the intrusion of electronic noises generated by the automobile itself, into the radio signals received by the antennae and transmitted to the receiving set.

(c) Such shielding was required in order to enable automobile radio receiving sets to function satisfactorily in the electronic environment created by the automobile.[4]

(d) The evidence does not indicate that the shielded cables supplied as components of some of the plaintiff's automobile radio antennae would incapacitate the antennae from functioning if used in connection with a home radio, but there [18] is no evidence that the plaintiff ever sold them except for use on automobiles, and they were specifically designed for such use.

(e) The tax in controversy was imposed on sales of the plaintiff's automobile radio antennae, regardless of whether they were sold with or without connecting cables. No tax

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[4] Sometimes, in addition, special suppressors, condensers, connectors, or adapters were required to eliminate motor noise, static pickup, or noises caused by the generator, the dome light or the ammeter, or for other purposes essential to the satisfactory functioning of a radio receiving set in a particular automobile. Insofar as appears, these devices were sold only separately, not as components of the plaintiff's automobile radio antennae.

was imposed, however, upon sales of the cables alone, when they were sold separately from the mast, with its insulating washers and fastening means adapted to attach it to the automobile. Nor is there any evidence that the tax was imposed on sales of suppressors, condensers, connectors, or adapters sold separately.

Whether the Plaintiff's Automobile Radio Antennae Were Designed to Add to the Utility of Automobiles

17. (a) The defendant appears to contend that, within the meaning of the regulation (see finding 7), the plaintiff's automobile radio antennae were "* * * designed to be attached to * * * [the] vehicle * * * to add to its utility * * *."

(b) The plaintiff's automobile radio antennae were designed to be attached to, and used in connection with automobiles, but the evidence affords no support for the contention that the objectives of their design included adding to the utility of automobiles as movable motor vehicles. Their primary, if not their sole purpose was to facilitate the satisfactory operation of radio receiving sets located inside the automobiles to which they were attached.

(c) The plaintiff's automobile radio antennae were not designed to facilitate the operation of automobiles to which they were attached or to add to the utility of such automobiles as movable vehicles. Insofar as appears from this record, automobiles would function as well without them as with them.

Whether the Plaintiff's Automobile Radio Antennae Were Designed to Add to the Ornamentation of Automobiles

18. (a) The defendant appears to contend that, within the meaning of the regulation (see finding 7), the plaintiff's automobile radio antennae were "* * * designed to

be attached to * * * [the] vehicle * * * to add to its * * * ornamentation, * * *."

[19]

(b) The evidence affords little, if any, support for the contention that ornamentation of automobiles was an objective of the design of the plaintiff's functional automobile radio antennae.

(c) It is a reasonable inference from the evidence as a whole that the primary objective of the design of the plaintiff's functional automobile radio antennae was to facilitate the receipt of radio impulses and to transmit them to a radio receiving set in the automobile.

The design of antennae adapted to perform this function was limited and defined by electronic requirements which plainly dictated the general form and structure of the devices the plaintiff made and sold, and on which it paid the tax.

There is nothing in the evidence to suggest that, in the absence of a need for functional antennae to enable automobile radios to operate satisfactorily, rods, similar in form to the masts of plaintiff's automobile radio antennae, projecting upward from any of the locations where the antennae were customarily attached, would have been installed on automobiles for the purpose of adding to their ornamentation.

(d) Obviously, however, automobile radio antennae—extending upward—in some cases vertically—in others, sloped backward, at an acute angle from the vertical—and occasionally looped in an arc between two points of attachment—constitute a conspicuous element of the visible form of vehicles to which they are attached. Accordingly, the plaintiff sought to make them as pleasing, aesthetically, according to its estimate of the public taste, as it could.

Its catalogues emphasize the styling and appearance of some of its models. Some had "decorative Saturn rings."

Some were "Color keyed to complement any car." Some were finished "in all the lustre of gold." Some bases for the antennae were "plated in gleaming chrome to add the finishing touch." Others were "simulated gold plated for lasting beauty."

These decorative features were not, however, primary objectives of the design of the antennae. They represent merely the results of efforts to make functional items, essential for a nondecorative purpose, the basic form of which [20] is fixed by technical requirements, as attractive as they could be made and still fulfill their function.

(e) The conclusion that ornamentation of automobiles was not a primary object of the design of plaintiff's automobile radio antennae is fortified by the fact that some of the antennae were telescopic and could be lowered out of sight when they were not in use to facilitate receipt of radio signals. The evidence does not show whether the primary objective of this retractable feature was to enhance the appearance of the vehicle by concealing the antenna whenever its projection was not functionally necessary, to remove it as a possible obstruction to visibility, or to eliminate or minimize the risk of its striking overhead objects or becoming entangled with obstructions. Whatever the reason, the telescopic antennae were designed to facilitate the elimination of any ornamental effect the projecting mast might be thought to have, whenever the radio was not in use.

19. (a) In addition to numerous models of functional automobile radio antennae, the plaintiff manufactured and sold simulated antennae. These were described in one of its catalogues as "Gleaming chrome ornamental antenna * * * For mounting on motorcycles, boats, kiddie cars, scooters, bikes, autos."

(b) These so-called "ornamental" antennae were metal masts, generally similar in appearance to the masts of the functional automobile radio antennae previously described. They had no cables or connectors such as those usually sold as components of the functional automobile radio antennae, and they sold for a small fraction of the selling price of the functional antennae. Their total sales amounted to less than 2 percent of the plaintiff's total antenna sales. The evidence does not show how many of the simulated antennae sold were for use on automobiles and how many for use on motorboats, motorcycles, bicycles, kiddie cars, or scooters. The plaintiff paid no tax on those sold for use elsewhere than on automobiles and probably paid no tax on those sold to be used on automobiles.

(c) The fact that the plaintiff sold a few so-called "ornamental" simulated antennae for use on automobiles does not, in itself, establish that its functional automobile radio an- [21] tennae were designed to add to the ornamentation of automobiles to which they might be attached.

(d) According to the evidence, most persons who bought the simulated antennae, whether for attachment to automobiles, motorboats, motorcycles, scooters, bicycles, or kiddie cars, did so primarily for the purpose of creating an impression that they had a radio, rather than because they regarded the useless upward projecting mast as intrinsically an adornment that added beauty to the vehicle to which it was attached. It is a reasonable inference that the simulated antennae were designed primarily to facilitate this sort of mild deception.

(e) To the extent there may have been some persons who had no interest either in radio reception or in displaying an antenna mast as a simulated status symbol, but genuinely considered an antenna mast a thing of beauty which, in their judgment, would enhance and embellish the

aesthetic appeal of an automobile,[5] it may be that the plaintiff's simulated antennae were designed to attract the business of such persons, as well as the business of those who merely wished to appear to have a radio they did not have. In view, however, of the limited number of all sales of simulated antennae, and the evidence that most of even such sales were motivated, not primarily by aesthetic considerations, but by a desire to suggest the existence of nonexistent material possessions, the record fails to establish that the number of persons who might buy antennae, primarily or exclusively as ornaments, was large enough to justify a conclusion that ornamentation of automobiles was a substantial factor in the design of the plaintiff's functional automobile radio antennae.

Ultimate Conclusions Concerning the Design Objectives of Plaintiff's Automobile Radio Antennae

20. The plaintiff's automobile radio antennae were designed to be attached to, and to be used in connection with automobiles.

[22]

21. The plaintiff's automobile radio antennae were not designed to add to the utility, *as movable vehicles,* of the automobiles to which they were attached, but only to facilitate the satisfactory performance of radio receiving sets mounted within such automobiles.

22. The plaintiff's automobile radio antennae were not

[5] It is not shown by this record, but is evident through common human experience, that squirrel tails, flowers, and other electronically useless objects are sometimes fastened to automobile antennae. Such occasional use of antenna masts, as adjuncts to an obvious effort at ornamentation, tends to confirm the probable existence of some people who may regard antennae masts themselves as ornamental.

designed to add to the ornamentation of the automobiles to which they were attached, although they were designed to be as pleasing, aesthetically, according to the designers' taste and judgment, as the form required for the satisfactory performance of their radio function would permit.

Whether the Primary Use of the Plaintiff's Automobile Radio Antennae Was in Connection with Automobiles

23. (a) The plaintiff's automobile radio antennae were designed primarily to be mounted on automobiles.

(b) The evidence does not show whether any models of the plaintiff's automobile radio antennae were designed to function, or would function as antennae for radio receiving sets located elsewhere than in an automobile. Nor is there any evidence that the plaintiff ever offered such antennae for sale for any use except for mounting on automobiles to facilitate the functioning of automobile radio receiving sets.

(c) The primary use of the plaintiff's automobile radio antennae was in connection with automobiles.

Whether the Plaintiff Passed On the Tax

24. The plaintiff's participation in the business of making and selling automobile radio antennae commenced with its acquisition of assets and assumption of liabilities (including tax liabilities) of Insuline on October 1, 1955.

25. (a) In connection with its acquisition of Insuline's assets and liabilities, the plaintiff was furnished a balance sheet of Insuline, certified by accountants who represented that they had completed an audit of Insuline's books and records as of September 30, 1955, and that the balance sheet presented fairly the position of Insuline as of that date.

(b) The balance sheet referred to in finding 25(a) was accompanied by a schedule of taxes payable as of September [23] 30, 1955, which included no item of excise taxes payable as of that date.

26. Late in 1956, somewhat more than a year after the plaintiff acquired Insuline's assets and liabilities, and became engaged in the manufacture and sale of automobile radio antennae, through a reconstituted Insuline, the Internal Revenue Service ruled that sales of automobile radio antennae were taxable as sales of automobile parts or accessories.

27. Sometime in 1957, an officer of the plaintiff then in charge of the plaintiff's accounting and taxes, who had entered the plaintiff's employ January 7, 1957, discussed with Insuline's credit manager, who had been with Insuline for a number of years, and with the accountant who had certified the Insuline balance sheet referred to in finding 25, whether Insuline was subject to excise taxes on its sales of automobile radio antennae. He was assured by both that the accountant had established that the excise tax was not applicable to such sales.

28. In October 1957 the plaintiff employed an expert tax accountant who, after a survey, informed the plaintiff's management of the possibility that sales of its automobile radio antennae might be subject to an excise tax.

29. Thereafter legal advisers were consulted. They also advised the plaintiff's management that an obligation for excise tax on sales of the plaintiff's automobile radio antennae might be asserted.

30. Promptly after receipt of the legal advice described in finding 29, the plaintiff initiated discussions with representatives of the Internal Revenue Service concerning the possibility that it might be liable for excise taxes on sales

of its automobile radio antennae, and, in February of 1958, filed the first of the excise tax returns described in findings 36 through 43.

31. Meanwhile, shortly after the plaintiff was advised of the possibility that it might be liable for an excise tax on sales of its automobile radio antennae, it set up on its books, for the first time, reserves against possible liability for the tax.

32. On February 11, 1958, the plaintiff's treasurer made the following representations, in a letter to the Internal Revenue Service, requesting that penalties be waived on the [24] taxes which, according to the letter, the plaintiff had then tendered:

* * * * *

> This company's manufacture and sale of automobile radio antennas is a part of an operation at Manchester, New Hampshire which was acquired as of October 1, 1955 from Insuline Corporation of America (name since changed to I.C.A., Inc.). Van Norman Industries, Inc. acquired the assets and assumed the recorded liabilities of the old Insuline Corporation. It did not acquire the stock or assume any unrecorded liabilities. Operations subsequent to acquisition were conducted by a new corporation formed by Van Norman with the name, Insuline Corporation of America.
>
> Late in 1957 the Bureau's ruling regarding the taxability of automobile radio antennas was brought to the company's attention. This question had previously been considered by various management employees and they had been advised that automobile radio antennas were not subject to excise tax upon advice of the Insuline certified public accountant who had previously handled such matters for the company. A further answer was that the matter had

been discussed with the Bureau at some past time and that the non-taxable status of the antennas had been established by the accountant.

In spite of these prior advices of the company's accountant, the management reviewed the question upon disclosure of the Bureau's ruling and ascertained that the Bureau's position had been for some time past that such antennas were subject to tax. After full investigation and careful consideration, the company therefore prepared and tendered returns for the entire period of its ownership of the business.

It is the company's belief that it exercised due diligence in this matter in relying upon the advice of its public accountant and it is, therefore, respectfully requested that any penalties be waived.

33. (a) On February 25, 1958, an examining officer of the Internal Revenue Service issued a report of his examination of the plaintiff's books and records, which, according to his report, was made—

> * * * to ascertain the correct excise tax liability on its [the plaintiff's] sales of automobile accessories taxable under the applicable provisions of section 4061 of the 1954 Internal Revenue Code.

[25]

(b) In the report the examining officer:

(1) Recommended that delinquent tax of $93,494.61 be assessed against the plaintiff, together with statutory interest,

(2) Concluded that the plaintiff's contention that no tax had been reported or paid for the period in question because it had been advised by the accounting firm formerly employed by the acquired corporation that no tax liability was incurred on the sale of any of its products appeared

to be borne out by the fact that no mention of excise tax liability appeared in the agreement of sale of the corporation to the plaintiff, and

(3) Recommended that the penalty for delinquency be waived.

34. (a) The record contains a substantial sampling of invoice data showing the sales prices of various models of the plaintiff's automobile radio antennae during the period here in controversy. Neither these samples nor any other evidence in the record shows specifically, or in detail, what elements were included in the prices charged for automobile radio antennae by the plaintiff's predecessor, or by the plaintiff or its wholly owned subsidiary, Insuline. Accordingly, there is no direct proof that the amount of the tax was not included in such prices.

(b) However, in the absence of any positive evidence that the prices charged did include the tax, it is a reasonable inference from the evidence as a whole that they did not.

(c) Although the plaintiff, and Insuline, had list prices and sold at list prices when they could, they were engaged in a highly competitive market and frequently sold for whatever price they could charge, and still get the business. As a consequence, there are substantial variations in the prices they got for the same antennae in different transactions. Some sales were below list. Others were above list. These latter included foreign sales and sales to Government agencies that were exempt from the tax.

(d) The haphazardly opportunistic character of the plaintiff's pricing policy generally, the credible documentary evidence that Insuline's management was unaware of the possible application of the tax at the time when it sold Insuline to the plaintiff, the fact that there was no published [26] ruling that the tax applied to sales

of automobile radio antennae until more than a year after the plaintiff acquired Insuline, and the fact that an examining officer of the Internal Revenue Service, after auditing the plaintiff's books and records in 1958, was persuaded that the plaintiff had been unaware, until late 1957, that the tax might be applicable to such sales, combine to afford a substantial basis for concluding that neither the plaintiff nor Insuline realized or suspected, until late in 1957, that the tax on automobile parts and accessories might apply to sales of their automobile radio antennae.

(e) This evidence is sufficient to rebut the initial presumption that Insuline and the plaintiff included, or attempted to include, the amount of the tax in the prices they charged for their automobile radio antennae, before they were advised, late in 1957, that the tax might be applicable to sales of such antennae. In the absence of any specific, countervailing evidence that the tax was passed on, the record as a whole establishes that it was not.

(f) The evidence concerning the plaintiff's prices, after the time in 1957 when it was specifically advised that sales of its automobile radio antennae might be subject to excise taxes, does not show any specific or consistent pattern of changes that reasonably could be regarded as indicative of a change in policy for the purpose of adding the amount of the tax to its previous prices.

(g) In the absence of any specific evidence that the plaintiff changed its prices so as to pass on the tax after it was advised in 1957 that the tax might apply to sales of its automobile radio antennae, the evidence as a whole is adequate to establish that it did not pass on the tax either theretofore or thereafter.

35. Except during 1955, the portion of the plaintiff's enterprise which produced and sold automobile radio antennae operated at a loss. For the years 1955, 1956, 1957, and 1958, the plaintiff's gross sales of automobile radio

antennae, its profit (or loss) on such sales, and the percentage relationship of its profit (or loss) to its gross sales, were as follows:

[27]

Year	Profit (loss)	Gross sales	Profit (loss) percentage of gross sales
1955	$68,095.26	$661,122.86	10.3%
1956	(724,783.99)	2,547,440.24	(28.4%)
1957	(697,126.91)	2,213,773.33	(31.4%)
1958[1]	(1,326,000.00)	949,000.00	(139%)

[1] The loss shown for 1958 does not include a loss on liquidation which brought the total loss for that year to about $1,500,000.

36. In February of 1958, the plaintiff filed with the District Director of Internal Revenue for the Lower Manhattan District of New York City (hereafter called the New York District Director) a manufacturers excise tax return on Form 720 with respect to automobile radio antennae sold by Insuline from October 1, 1955, to December 31, 1955, and paid the tax of $11,195.85 shown on the return as due.

37. In February of 1958, the plaintiff filed with the New York District Director quarterly manufacturers excise tax returns on Form 720 with respect to automobile radio antennae sold by Insuline from January 1, 1956, to December 31, 1956, and paid the aggregate tax of $46,512.66 shown on the returns as due.

38. In February of 1958, the plaintiff filed with the New York District Director quarterly manufacturers excise tax returns on Form 720 with respect to automobile radio antennae sold by Insuline, and the plaintiff, from January 1, 1957, to December 31, 1957, and paid the aggregate tax of $35,786.10 shown on the returns as due.

39. In addition to the payments of tax referred to in findings 29 through 31, the plaintiff, in February of 1958, paid to the New York District Director $6,082.57 as interest on the tax payments.

40. On April 30, 1958, the plaintiff filed with the District Director of Internal Revenue for the Portsmouth, New Hampshire District, a manufacturers excise tax return on Form 720 with respect to automobile radio antennae sold by it from January 1 to March 31, 1958, and paid the tax of $11,278.26 shown on the return as due. This was subsequently determined to be an overpayment of $2,151.75, as the tax due was $9,126.51.

[28]

41. On July 31, 1958, or August 21, 1958, the plaintiff filed with the New York District Director a manufacturers excise tax return on Form 720 with respect to automobile radio antennae sold by it from April 1, 1958, to June 30, 1958, and paid the tax of $11,631.12 shown on the return as due. This payment included cash of $9,740.52 and credit for the overpayment for the previous quarter in the amount of $2,151.75. This left the plaintiff with a balance of $261.15 to its credit.

42. On October 31, 1958, or November 17, 1958, the plaintiff filed with the New York District Director a manufacturers excise tax return on Form 720 with respect to automobile radio antennae sold by it from July 1, 1958, to September 30, 1958, and paid the tax of $11,357.72 shown on the return as due. This payment included cash of $11,086.57 and credit for the overpayment for the previous quarter in the amount of $261.15.

43. On January 31, 1959, or February 20, 1959, the plaintiff filed with the New York District Director a manufacturers excise tax return on Form 720 with respect to

automobile radio antennae sold by it from October 1, 1958, to December 31, 1958, and paid the tax of $6,548.29 shown on the return as due.

44. The plaintiff paid an excise tax on sales of automobile radio antennae at the rate of 8 percent in the total amount of $132,158.25.

45. (a) On June 24, 1960, the plaintiff duly and timely filed with the New York District Director, on separate Forms 843, claims for refund of manufacturers excise taxes paid with respect to its sales of automobile radio antennae, in the amounts and for the periods stated in the following table:

Period:	*Amount*
Oct. 1, 1955—Dec. 31, 1955	$11,195.85
Jan. 1, 1956—Dec. 31, 1956	46,512.66
Jan. 1, 1957—Dec. 31, 1957	35,786.10
Jan. 1, 1958—Dec. 31, 1958	38,663.64
	132,158.25

(b) In the case of each claim, the plaintiff requested refund of any larger amount that may be legally refundable, and interest as provided by law.

46. By registered mail, dated October 20, 1960, the plaintiff's claims for refund were disallowed in full.

[29]

Conclusion of Law

Upon the foregoing findings of fact, which are made a part of the judgment herein, the court concludes as a matter of law that plaintiff is not entitled to recover and the petition is therefore, dismissed.

APPENDIX C

Rev. Rul. 66-163, I. R. B. 1966-24,9.

The Internal Revenue Service has reconsidered Revenue Ruling 60-39, C. B. 1960-1, 406, as it relates to certain articles variously referred to as "slide-in cabins" or "pickup coaches," etc., designed to be mounted or placed upon pickup trucks, and described in *situations* (1) and (2) of that ruling. These articles are intended to be used as temporary or long-term living quarters and are usually equipped for sleeping and eating purposes. Revenue Ruling 60-39 held these articles to be taxable under section 4061(a)(1) of the Internal Revenue Code of 1954, as automobile truck bodies.

Section 4061(a)(1) of the Code imposes a tax on the sale by the manufacturer, producer, or importer of certain enumerated motor vehicle articles. Included in this enumeration are automobile truck bodies. Section 4061(b) of the Code imposes a tax on the sale by the manufacturer, producer, or importer of parts or accessories (other than tires or inner tubes) for any of the articles enumerated in section 4061(a) of the Code.

In the case of *King Trailer Company* v. *United States*, 350 Fed. (2d) 947 (1965), the United States Court of Appeals for the 9th Circuit affirmed a District Court decision holding "pickup coaches" are neither truck bodies nor truck parts or accessories. The Service recognizes this decision as a precedent in the disposition of other cases involving such articles.

Revenue Ruling 60-39 is hereby modified.

Rev. Rul. 66-164, I. R. B. 1966-24, 10.

Revenue Ruling 64-139, C. B. 1964-1 (Part 1), 373, provides that lifting jacks which are designed for use in

mounting or dismounting a "slide-in cabin" on or off a pickup truck are automobile "parts or accessories" as defined by section 48.4061(b)-2(a) of the Manufacturers and Retailers Excise Tax Regulations and are subject to manufacturers excise tax imposed by section 4061(b) of the Internal Revenue Code of 1954, when sold by the manufacturer.

However, Revenue Ruling 66-163, page 9, this Bulletin, recognizes that "slide-in cabins" of the type referred to in Revenue Ruling 64-139 are not taxable as automible truck bodies under section 4061(a)(1) of the Code. It follows that lifting jacks specially designed for use only with such nontaxable "slide-in cabins" are not subject to the tax imposed upon "parts or accessories" by section 4061(b) of the Code.

Revenue Ruling 64-139 is hereby revoked.

Rev. Rul. 66-165, I. R. B. 1966-24, 10.

Advice has been requested concerning the applicability of the manufacturers excise tax to manufacturers' sales of the electric signs described below.

A company manufactures and sells signs designed to be attached to automobile truck bodies or other bodies which are subject to tax under section 4061(a)(1) of the Internal Revenue Code of 1954. These signs are usually installed on top of truck or other bodies to advertise services or products. The signs are of plexiglas construction for either long-term or temporary installation. They may be wired to accommodate 6-volt, 12-volt, or 110-volt electrical systems and come equipped with switches, fuses, and wire. The plexiglas is available in a number of colors and cut plastic letters of the customers' specifications.

Section 4061(b) of the Code imposes a tax on the sale by the manufacturer, producer, or importer of parts or accessories (other than tires and inner tubes) for any of the articles enumerated in section 4061(a)(1) of the Code.

In *Howard H. Smith* v. *Joseph T. McDonald,* the United States Court of Appeals for the 3d Circuit, 214 Fed. (2d) 920 (1954), held that an electrically illuminated sign designed to be attached by suction cups to the tops of taxicabs was not an automobile part or accessory as contemplated by the law.

It is held that sales by manufacturers of signs designed to be installed on vehicles for advertising purposes are not subject to the manufacturers excise tax, imposed by section 4061(b) of the Code on "parts or accessories."

In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 1039

VAN NORMAN INDUSTRIES, INC., PETITIONER

v.

UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner manufactures radio antennae designed to be attached to automobile car bodies (Pet. 17b). With respect to sales made between October 1, 1955, and December 31, 1958, petitioner neither collected the 8 percent excise tax imposed upon sales by a manufacturer of automobile "parts and accessories" by Section 4061(b) of the Internal Revenue Code nor passed it on, but later (in 1958–1959), petitioner paid a total of $132,158.25 to the District Director of Internal Revenue (Pet. 32b–35b) and then brought this refund action in the United States Court of Claims. The court held that the radio antennae were "parts and accessories" within the meaning of Section 4061(b)

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and hence that no part of the taxes paid was refundable (Pet. 1b–14b).

The decision below is correct, and there is no basis for further review. So saying, we stress that the question involved in this case is of diminishing importance in the administration of the excise tax laws due to removal of the excise tax on automobile parts or accessories by Section 201(b)(2) of the Excise Tax Reduction Act of 1965, P.L. 89–44, 79 Stat. 136, effective as to all sales on or after January 1, 1966. Currently, the definition of automobile "parts or accessories" is material only as to sales made prior to that date and to sales of parts or accessories for trucks, buses, and trailers, which continue to be taxed (see Section 4061(b)(1) of the Internal Revenue Code of 1954, as amended).

1. The Court of Claims applied the standard of *Universal Battery Co.* v. *United States,* 281 U.S. 580, 584, that "articles primarily adapted for use in motor vehicles are to be regarded as parts or accessories of such vehicles." The Court of Claims' formulation that any article designed for attachment or connection to an automobile is taxable absent a showing that "the primary function of the article is to serve a purpose unrelated to the vehicle as such" (Pet. 8b) is, plainly, a paraphrase of the *Universal Battery* test. Adopting the detailed findings of its trial commissioner (Pet. 14b), the Court of Claims found that automobile radio antennae require special qualities for effective functioning in an automotive environment and that petitioner's antennae were, in fact, specifically designed for mounting outside of

automobiles (Pet. 19b–20b). These undisputed basic findings amply warranted the conclusion that petitioner's antennae were "primarily adapted" for use in automobiles, especially since there was no evidence that petitioner had ever sold its automobile radio antennae save for use in automobiles (Pet. 27b).

Petitioner advances the novel suggestion that articles connected to, specially designed for, and having no use other than with respect to, automobiles must yet escape classification as "parts or accessories" unless they serve an automotive function, *i.e.*, add to the utility of automobiles as movable vehicles. Nothing in this Court's *Universal Battery* opinion, *supra,* supports so restrictive a standard, and the Treasury Regulations, substantially unchanged since *Universal Battery,* include in "parts or accessories" any article whose primary use is "in connection with" an automobile "whether or not essential to its operation or use." Treasury Regulations 46 (1940 ed.), Section 316.55. Consistent with this administrative construction of the statute, numerous articles have been held to be "parts or accessories" despite their lack of utility to an automobile as a movable vehicle. See, *e.g., Massao Hirasuna* v. *McKenney,* 135 F. Supp. 897, 900 (D. Hawaii), affirmed, 245 F. 2d 98 (C.A. 9) (automobile seat covers); *Aran* v. *United States,* 259 F. 2d 757, 759 (C.A. 9), certiorari denied, 358 U.S. 866 (baby bottle warmers plugged into cigarette-lighter outlets); *Masterbilt Products Corp.* v. *United States,* 42 F. Supp. 294 (Ct. Cl.) (dispenser of lighted cigarettes attached to automobile steering posts).

2. The Court of Claims suggested that the decision in *Smith* v. *McDonald*, 214 F. 2d 920 (C.A. 3), albeit not in conflict with the Court of Claims' decision in the present case, may have been decided erroneously (Pet. 12b–13b).[1] In that case the Third Circuit, in the course of holding that electric signs attached to taxicab roofs were not automobile "parts or accessories," reasoned that taxi signs were analogous to taxi meters or automobile radios, both of which added to the "utility" of automobiles yet were specifically excluded from the "parts or accessories" tax. As the Court of Claims correctly observed, however, since Congress removed automobile radios from the classification of automobile parts and accessories, only to tax them at a higher rate as radios, it would be improper to infer a legislative intention to exempt from tax completely any related articles (like car radio antennae) which fall within the general category of parts or accessories and have not themselves been specifically exempted.[2]

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[1] Petitioner also seems to contend (Pet. 5) that the Court of Claims questioned the decision in *King Trailer Co.* v. *United States*, 228 F. Supp. 1013 (S.D. Calif.), affirmed, 350 F. 2d 947 (C.A. 9). That contention has no basis in fact (Pet. 12b). Moreover, the Internal Revenue Service has accepted the holding in the *King Trailer Co.* case. See Rev. Rul. 66–163, 1966–1 Cum. Bull. 252, and Rev. Rul. 66–164, 1966–1 Cum. Bull. 253 (Pet. 1c–2c).

[2] The Internal Revenue Service has accepted the result in *Smith* v. *McDonald*, although not its reasoning. See Rev. Rul. 66–165, 1966–1 Cum. Bull. 253 (Pet. 3c). Signs affixed for the special and unusual purpose of advertising the business carried on by the owner of a vehicle may be distinguished from articles commonly attached to an automobile for the convenience, comfort or pleasure of the operator—and so within the common

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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MARCH 1967.

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notion of a part or accessory—such as automobile radio antennae, which were ruled to be "parts or accessories" before the instant controversy arose. See Rev. Rul. 56–698, 1956–2 Cum. Bull. 801.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1966

No. 1039

VAN NORMAN INDUSTRIES, INC.,

Petitioner,

v.

THE UNITED STATES,

Respondent.

REPLY TO MEMORANDUM IN OPPOSITION

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Respondent.

REPLY TO MEMORANDUM IN OPPOSITION

Flinching from actuality, Respondent speaks only of a case with facts and law different in kind from petitioner's.

Respondent portrays petitioner as still in the antennae business from which it actually was forever driven about a decade ago by excise surprise.[1]

After conceding below the correctness of the Commissioner's findings that antennae of plaintiff's manufacture had only electronic function and added neither to utility nor ornamentation of automobiles,[2] and after addressing itself below to articles which had "little (and in some instances absolutely nothing) to do with

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[1] Petitioner's Trial Brief, pp. 39 *et seq.*

[2] Commissioner's Findings Nos. 17, 18, 21 and 22 (Pet. pp. 22b-23b, 26b-27b); Opinion below, pp. 4, 5 and 6 (Pet. pp. 4b-8b).

the operation of"[3] automobiles, Respondent speaks to this Court of articles which have "no use other than with respect to, automobiles."[4]

Respondent also[5] shows a desire to return to the position it unsuccessfully advanced below, that physical connection alone draws excise.[6] Respondent would have this Court ignore its own decision of nearly a third of a century ago that an accessory "for" an automobile is an

> "* * * article designed to be used in connection with such vehicle to add to its utility or ornamentation and which is primarily adapted for such use, whether or not essential to the operation of the vehicle."[7]

Respondent led the Court below into acknowledged conflict with the long-standing decision of the Court of Appeals for the Third Circuit that a taxi sign cannot be an accessory for a taxi because it is an accessory for the taxi business.[8] The working day after such success, Respondent renounced, and announced acceptance and expanded application of the decision

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[3] Brief for Respondent in Court below, p. 8.

[4] Memorandum in Opposition, p. 3.

[5] *Ibid.*

[6] "We are of the opinion that we have to look to the functional relationship of the article to the vehicle and not physical connection alone; this follows from *Universal Battery.*" Opinion below, p. 5 (Pet. p. 6b).

[7] *Universal Battery Co.* v. *United States,* 281 U.S. 580, 583 (1930).

[8] *Smith* v. *McDonald,* 214 F.2d 920 (3d Cir. 1954).

of the Circuit Court of Appeals which it had successfully attacked in the Court below.[9] Now it tells this Court that such acceptance was in result but not in reasoning,[10] even though there is no hint of this in the published language. The excised can only wonder.

Promptly after further leading the Court below into animadversion upon a decision of another Circuit Court of Appeals that a camper body is not an accessory for the truck on which it is mounted,[11] Respondent further renounced, and announced concurrence in that decision;[12] and then went on to announce that a jack for getting the body on and off the truck is not an accessory for the truck because it is an accessory for the body.[13] So too automobile radio antennae, taxed as accessories for radios, would not also be taxed as automobile parts or accessories. Dictionary and regulatory language have long held that an accessory can no more have two principals than a child can have two fathers.

And all this with respect to an excise which, as the Court below observed, can eradicate the net profit of all but the most profitable businesses.[14]

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[9] Rev. Rul. 66-165, 1966 Int. Rev. Bull. No. 24, p. 10 (Pet. p. 2c).

[10] Memorandum in Opposition, p. 4, n. 2.

[11] *King Trailer Co.* v. *United States*, 228 F. Supp. 1013 (S.D Cal. 1964), *aff'd*, 350 F.2d 947 (9th Cir. 1965).

[12] Rev. Rul. 66-163, 1966 Int. Rev. Bull. No. 24, p. 9 (Pet. 1c).

[13] Rev. Rul. 66-164, 1966 Int. Rev. Bull. No. 24, p. 10 (Pet. 1c).

[14] Opinion below, p. 11 (Pet. p. 13b).

That the contested excise has been partially repealed as falling on too many too hard[15] is no answer. This taxpayer was driven out of the business, and trucks (as distinguished from automobiles) are currently excised.

Conclusion

Petitioner respectfully prays that this Court grant the writ and summarily reverse the decision below or grant such other relief it finds appropriate.

Respectfully submitted,

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[15] H. Rep. No. 433, 89th Cong., 1st Sess. 20 (1965); S. Rep. No. 324, 89th Cong., 1st Sess. A-25 (1965).